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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EVAN COOPER,

Defendant and Appellant.

B263191

(Los Angeles County
Super. Ct. No. YA089313)

APPEAL from a judgment of the Superior Court of Los Angeles County. Eric C. Taylor, Judge. Affirmed in part, reversed in part, and remanded.

Correen Ferrentino, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Evan Cooper was sitting in a parked car, under suspicious circumstances, when he was detained by police. He refused to answer most of the officers' questions, which resulted in his arrest and the ultimate discovery of heroin in his possession. Defendant's appeal of his eventual conviction of drug and resisting arrest charges questions solely whether the officer who initially detained him had reasonable suspicion to do so. The issue was presented both to the trial court in the form of a Penal Code section 1538.5 motion, and to the jury in terms of the lawfulness of the police conduct that led to resisting arrest charges. We conclude that the evidence supports the court's, and the jury's, respective findings of reasonable suspicion. Accordingly, we find no error in defendant's subsequent conviction. However, we remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On January 11, 2014, sometime after 11:00 p.m., Redondo Beach Police Officer Patrick Knox spotted defendant's car in a small parking area, off an alley, behind several businesses. Defendant was parked behind the businesses although none of the establishments was open. The area was known to Officer Knox for narcotics and burglaries, both commercial and vehicle. Defendant's car was parked in an extremely dark area; there were streetlights, but they were not working. Defendant was alone, in the driver's seat of the car. His car was idling, but no headlights or brake lights were on.

Officer Knox was driving down the alley, patrolling the area. The headlights of his patrol car were off. When he spotted defendant's vehicle, he turned on his headlights, and saw defendant in the car. He pulled up directly behind defendant's car and activated his emergency lights.

Officer Knox approached defendant on foot; the driver's side window of defendant's car was halfway open. Officer Knox identified himself and told defendant he was being detained. He asked defendant for his driver's license; defendant said he did not have one. Shortly afterward he was arrested.

Given that the remainder of the post-detention facts are at best tangential to the resolution of the appeal, we discuss them only briefly. After defendant told Officer Knox he had no driver's license, Officer Knox asked if defendant had any other form of

identification; defendant said he had a California ID card, but declined to give it to Officer Knox. Officer Knox radioed for backup and asked for a sergeant to render assistance. Officer Knox continued his attempt to identify defendant, and defendant continued to refuse to cooperate and rolled his window up. When Sergeant Michael Strosnider arrived on the scene, he identified himself as the sergeant in charge, explained that it was important that the police obtain defendant's identification, and requested that defendant roll down the window. Defendant refused to comply. At one point, defendant spoke on his mobile phone to his father. Then, Sergeant Strosnider asked to speak to defendant's father through the phone's speaker. Defendant agreed, rolled down his window less than two inches and held his phone up to the gap. Sergeant Strosnider took advantage of the opportunity to wedge his flashlight into the opening to prevent defendant from rolling the window up again. After Sergeant Strosnider spoke to defendant's father, defendant refused multiple opportunities to comply with police requests that he identify himself and step out of the car. The officers forcibly removed him from the vehicle. One officer sprayed pepper spray through the window gap. When defendant shielded his eyes with his jacket, officers broke the car window. Three officers pulled defendant, who was struggling against them, from the car and placed him on the ground. Defendant was arrested and taken to jail. When being booked into jail, Officer Knox advised him that it was a crime to bring narcotics into jail. Defendant claimed he had no drugs on him. A search revealed heroin hidden in a piece of plastic inside the waistband of defendant's boxers.

Defendant was charged by amended information with possession of heroin (Health & Saf. Code, § 11350, subd. (a)); two counts of resisting a peace officer (Pen. Code, § 148, subd. (a)(1)); and bringing a controlled substance into jail (Pen. Code, § 4573, subd. (a)). All charges except for bringing heroin into a jail were misdemeanors.

Before trial, defendant moved under Penal Code section 1538.5 to suppress the heroin, on the theory that it was the product of a search which was itself the result of an

illegal detention; the motion was denied.¹ The case proceeded to jury trial; at the close of the prosecution's case, defendant moved for acquittal of all charges under section 1118.1, again challenging the legality of the detention; this too was denied. Defendant was found guilty as charged. Defendant was sentenced to the midterm of three years on the felony heroin possession; the trial court stayed sentencing on the three misdemeanors under section 654.

DISCUSSION

On appeal, defendant contends the trial court erred in denying his motion to suppress and denying his motion for acquittal of the resisting counts. He also argues the evidence is insufficient to support his conviction of resisting. Although defendant frames three separate arguments on appeal, each is based on the premise that Officer Knox lacked reasonable suspicion to detain him. We first address the law of reasonable suspicion, then turn to defendant's challenges.

1. Reasonable Suspicion to Detain

"It is well established that certain temporary seizures short of arrest based upon probable cause are justifiable under the Fourth Amendment where the officer subjectively has a reasonable and articulable suspicion based upon objective facts that the person to be detained is involved in crime which has occurred, is occurring, or is about to occur. [Citations.]" (*People v. Wilkins* (1986) 186 Cal.App.3d 804, 808.) An investigative stop is valid if " 'the circumstances known or apparent to the officer . . . include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity.' [Citation.]" (*People v. Perrusquia* (2007) 150 Cal.App.4th 228, 233.)

Preliminarily, we conclude defendant was detained by Officer Knox when Officer Knox activated his emergency lights, pulled up behind defendant's car and told defendant he was detained. An officer's activation of emergency lights "in close proximity to a

¹ All future undesignated code references are to the Penal Code.

parked car” does not always constitute a detention, although it often does, depending on the circumstances. (*People v. Brown* (2015) 61 Cal.4th 968, 980 (*Brown*).) Here, Officer Knox activated his emergency lights and told defendant he was being detained.

Defendant’s subsequent admission that he had no driver’s license, although his car was running at the time, strongly suggested that he was in violation of Vehicle Code section 12500, which prohibits driving without a license, even in a private parking lot. It is therefore not disputed that, after defendant’s admission, Officer Knox was well within the law to continue his questioning of defendant. The sole issue on appeal is whether Officer Knox had sufficient reasonable suspicion at the outset when he detained defendant and first asked for his license.

In determining whether reasonable suspicion exists, we do not consider individual facts in isolation. Instead, we consider the totality of the circumstances to determine whether the detaining officer has a particularized and objective basis for suspecting wrongdoing. (*Brown, supra*, 61 Cal.4th at p. 980.) “In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. [Citation.]” (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124-125.)

That said, case law has established that certain factors are relevant to the analysis. “An area’s reputation for criminal activity is an appropriate consideration in assessing whether an investigative detention is reasonable under the Fourth Amendment. [Citations.]” (*People v. Souza* (1994) 9 Cal.4th 224, 240.) “The time of night is another pertinent factor in assessing the validity of a detention.” (*Id.* at p. 241.) However, reasonable suspicion cannot be based only on factors unrelated to the defendant, such as criminal activity in the area. (*People v. Casares* (2016) 62 Cal.4th 808, 838.)

The possibility of an innocent explanation for the defendant’s conduct does not defeat an officer’s reasonable suspicion. (*Brown, supra*, 61 Cal.4th at p. 985.) Indeed, the purpose of the detention is to resolve the ambiguity by allowing the officer to

efficiently investigate short of an arrest. (*Id.* at p. 986.) A detention's brevity and limited intrusiveness weigh heavily in favor of a finding of reasonableness. (*Ibid.*)

2. *Motion to Suppress*

The lawfulness of Officer Knox's detention is relevant both to the denial of the 1538.5 motion and the denial of the motion for acquittal. We consider the suppression motion first.

"In reviewing the trial court's suppression ruling, we defer to its factual findings if supported by substantial evidence. We independently assess the legal question of whether the challenged search or seizure satisfies the Fourth Amendment. [Citation.]" (*Brown, supra*, 61 Cal.4th at p. 975.)

At the hearing on the motion to suppress, Officer Knox testified much as he eventually did at trial: He saw defendant's car at 11:20 p.m. in the parking lot behind the businesses. It was completely dark where the car was parked. All of the businesses were closed. There had been a lot of criminal activity behind the store, including businesses being broken into and stolen cars being dropped off. Defendant's car was running.

In contrast, defendant testified at the suppression hearing that when Officer Knox approached him, his car was not running, and he was sitting in the parked car talking on his phone. He had been driving to his girlfriend's house and had pulled over to talk on the phone.

At the end of the testimony, defendant argued that, although Officer Knox had testified to his subjective belief that there had been crimes in the area, there was no objective evidence of prior crimes. The trial court appeared to accept the officer's testimony, but continued the hearing to allow the prosecutor to bring in crime reports. At the continued hearing, the prosecutor produced 16 reports for vehicle recovery, burglary and vandalism "all in the general area where this particular crime occurred." Many reports were authored by Officer Knox himself.

The trial court concluded there was reasonable suspicion for the limited detention, and denied the motion. In setting forth the facts, the court accepted Officer Knox's view of the evidence, specifically that the court believed defendant's car had been running.

To the extent the trial court adopted Officer Knox's view of the facts and not defendant's, the court's factual findings are clearly supported by the evidence. We therefore consider those facts to have been true and consider their legal effect.

The prosecution established the factors that the detention occurred at night in a high crime area. Defendant was sitting in a car behind closed businesses. As to factors pertaining to the defendant himself, his car was not parked, but idling, apparently ready to make a quick getaway. Taken together, these facts establish a reasonable suspicion that defendant was involved in criminal activity, sufficient to justify the limited detention of parking behind him and requesting his identification.

The case is distinguishable from recent Supreme Court authority. In *People v. Casares, supra*, 62 Cal.4th at pages 836-837, the defendant was parked in the less well-lit north side of a Circle K parking lot, even though there were better lit spots nearer the open store. On appeal, the Supreme Court concluded that "mere presence in a car legally parked on the less illuminated north side of the convenience store, in an area without demarcated parking spaces at a time when other parking spaces were available, did not justify . . . detention." (*Id.* at p. 838.) The officer's knowledge of prior robberies at the store, in which the robbers had exited the parking lot on the north side, did not add enough to establish reasonable suspicion. (*Ibid.*) We find the facts of our case in significant contrast: here, the store was closed, and defendant's car was idling behind it with the headlights off. An officer with knowledge of criminal activity in the area reasonably could have assumed defendant was up to no good. Defendant's decision to turn off the headlights while at the same time keeping the engine running suggested that defendant was either casing the store or waiting for a confederate, primed for a quick getaway.

3. *Sufficiency of the Evidence/Motion for Acquittal*

" "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the

judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citation.]’ ” (*People v. Virgo* (2013) 222 Cal.App.4th 788, 797.)

“Moreover, in ruling upon a motion for judgment of acquittal under section 1118.1, a trial court applies the same standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction. [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

Defendant was convicted of two counts of resisting a peace officer, in violation of section 148, subdivision (a). “ ‘The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. [Citations.]’ [Citation.]” (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.) Defendant challenges only the second element, that the officer was engaged in the performance of his duties. As the jury was instructed, this element requires that the officer be engaged in the *lawful* performance of his duties. (CALCRIM No. 2656.) A detention without reasonable suspicion is not the lawful performance of duty. (CALCRIM No. 2670.)

We look now at the evidence at trial, uninfluenced by the testimony at the suppression hearing to which the jury was not a party. Officer Knox testified it was after 11:00 p.m. at night; defendant’s car was parked behind the closed businesses; and the area had problems with burglaries and narcotics. According to Officer Knox, “[m]ost burglaries of businesses occur after hours which is why it’s suspicious to be parked behind closed businesses.” The car was idling in an “extremely dark” location. In our view, this adds up to sufficient evidence of reasonable suspicion, justifying the trial court’s denial of the section 1118.1 motion and the jury’s verdict.

4. *Sentencing*

At the sentencing hearing, defendant argued for the low term on the felony (bringing a controlled substance into jail), with concurrent sentences on the three misdemeanors. The trial court instead selected the midterm, stating, “So, the midterm of

three years is selected although the court will stay sentencing on the remaining counts. So, it would be three years.” That is all that was said. We can discern from the context, and the charges, that the court was imposing the middle base term of three years on the sole felony count of bringing a controlled substance into jail. As to the remaining misdemeanor counts (possession of heroin and two counts of resisting arrest), however, we are left in the dark. The court did not indicate what amount of the maximum one-year sentence it was imposing on any of the misdemeanor counts. To be sure, the abstract of judgment and minute order purport to indicate the remaining terms were stayed pursuant to section 654. Setting aside that the minute order and abstract of judgment cannot take the place of a court’s oral pronouncement of judgment, we note the following about the applicability of section 654.²

Section 654, subdivision (a) provides, in pertinent part, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The proper course of action when section 654 applies is not to stay imposition of sentence; sentence should be imposed and then execution stayed. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.) The court therefore erred in failing to impose and stay terms for any of the counts to which section 654 applied.

More interesting, however, is the question of whether section 654 actually applied to the three misdemeanors. It cannot be disputed that the sentence for possession of heroin was properly stayed given that defendant was sentenced for bringing the very same heroin into jail. But what of the two resisting counts? Should neither, one, or both of them have been stayed? We can conceive of no basis to stay sentences on the resisting counts based on an unstayed sentence for bringing heroin into jail; the resisting and possession counts involved completely different offenses. Defendant does not argue otherwise. Therefore, the trial court erred in not imposing an unstayed sentence on at

² We requested the parties to brief issues relating to the application of section 654 in this case.

least one resisting count. Defendant argues, however, that because he obstructed both Officer Knox (count three) and Sergeant Strosnider (count five) pursuant to the same goal of avoiding arrest, sentence on one of the two counts must be stayed. (*People v. Martin* (2005) 133 Cal.App.4th 776, 781 [multiple punishment is barred for a course of conduct that constitutes an indivisible transaction with a single criminal objective].) The prosecutor responds that a defendant can be sentenced (without stays) on multiple counts of obstructing when the defendant had separate objectives in obstructing each officer in sequence. (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240.) While there is evidence on both sides, it does not appear that the trial court made the necessary factual finding. We therefore remand for the court to do so in the first instance.

DISPOSITION

The judgment is reversed and remanded for resentencing. Specifically, the court shall: (1) impose and stay sentence on misdemeanor possession of heroin; (2) impose, but not stay, a sentence for one count of resisting a peace officer; (3) determine whether section 654 requires sentence on the second resisting count to be stayed, and (4) sentence defendant on that count accordingly. In all other respects, the judgment is affirmed.

RUBIN, J.

I CONCUR:

BIGELOW, P. J.

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Flier, J., Dissenting

The majority correctly concludes that defendant was detained by Officer Patrick Knox when Knox “activated his emergency lights and told defendant he was being detained.” (Maj. opn. *ante*, at p. 5.) The critical issue underlying both defendant’s challenge to the denial of his motion to suppress and defendant’s challenge to the sufficiency of the evidence is whether the detention was lawful. (*Ibid.*) I respectfully dissent because, in contrast to the majority, I conclude that, under the totality of the circumstances, there was no objectively reasonable basis to detain defendant.

A. Background

Additional background is necessary. In the context of defendant’s motion to suppress, Officer Knox testified that the parking lot where defendant was detained was completely dark and he did not know whether defendant’s vehicle was occupied. Defendant’s headlights were off. When he “noticed” that defendant was “in the driver’s seat,” Officer Knox “approached the driver’s window and told him [(defendant)] why I was detaining him.” Knox testified that no one else was in the area.

Officer Knox testified consistently at trial. He explained: “[A]s soon as I saw a vehicle, I turned my headlights on. That’s when I noticed the defendant in the driver’s seat. I pulled directly behind his vehicle and activated my emergency lights.” Then Knox approached defendant and told him “why I was detaining him.” Defendant was not able to nor did he attempt to “leave that area,” because as Knox testified, defendant “was being detained.”

During the course of his testimony, Officer Knox essentially acknowledged that defendant was not engaged in suspicious conduct prior to the detention. When asked whether defendant was “doing anything that was suspicious” when he “approached” defendant, Knox responded, “*No.*” (*Italics added.*) When asked if defendant was committing any crime when he was detained, Knox responded, “Not that I know of.”

When asked, “When you surprised Mr. Cooper, was he committing a crime,” again Knox responded, “No.”

B. Analysis

“ ‘A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.’ ” (*People v. Casares* (2016) 62 Cal.4th 808, 837-838 (*Casares*).) The standard requires “a ‘particularized and objective basis’ for suspecting the person stopped of criminal activity.” (*Ornelas v. United States* (1996) 517 U.S. 690, 696.) As I shall explain, the totality of the circumstances here did not show any specific articulable facts that defendant was involved in criminal activity prior to the detention.

1. This Court Is Required to Follow the California Supreme Court’s Holding in Casares, supra, 62 Cal.4th 808

Casares is indistinguishable. In *Casares*, the defendant was parked in a poorly lit area of a store parking lot late at night. (*Casares, supra*, 62 Cal.4th at p. 837.) The officer who observed the defendant’s van was aware of prior robberies of the store. (*Ibid.*) The high court concluded that the defendant’s “mere presence in a car legally parked on the less illuminated north side of the convenience store, in an area without demarcated parking spaces at a time when other parking spaces were available, did not justify his detention” even though there had been prior robberies at the store. (*Id.* at p. 838.) As in *Casares*, here defendant was detained because of his location in a parking lot of businesses where criminal activity previously had occurred. Just as in *Casares*, that evidence was insufficient to support defendant’s detention.

Casares made it clear that “reasonable suspicion cannot be based solely on factors unrelated to the defendant, such as criminal activity in the area.” (*Casares, supra*, 62 Cal.4th at p. 838.) Here, Officer Knox relied on factors unrelated to defendant because he testified that defendant was not engaged in suspicious activity, was not committing a crime, and was merely seated in his vehicle when Knox detained him. Knox testified that he “approached” defendant as soon as he noticed the vehicle was occupied. And, more

importantly, Knox testified that defendant was not doing anything suspicious. Knox's testimony demonstrates that there were no defendant-specific facts supporting the detention.¹

Although Officer Knox testified that defendant stopped in an area where crimes previously occurred, "reasonable suspicion cannot be based solely on factors unrelated to the defendant, such as criminal activity in the area." (*Casares, supra*, 62 Cal.4th at p. 838.) Our high court emphasized that a "subject's presence in an area of expected criminal activity does not alone support a reasonable suspicion he or she is committing a crime." (*Ibid.*) Otherwise a location's history of criminal activity would justify the detention of every person visiting that location.

The majority's purported distinction between this case and *Casares* is contradicted by the evidence. The majority states: "Defendant's decision to turn off the headlights while at the same time keeping the engine running suggested that defendant was either casing the store or waiting for a confederate, primed for a quick getaway." (Maj. opn. *ante*, at p. 7.) In contrast, the evidence shows that defendant was seated in his car; his headlights were off; no one else was in the area; and defendant was not engaging in any criminal activity such as casing a store or waiting for a confederate to drive away. Moreover, defendant made no attempt to drive away.

First, Officer Knox's testimony undermined the majority's speculation that defendant was waiting for a "confederate." When asked if there was anybody else in the area, Knox responded, "No. Just us and him."

¹ Defendant did not try to flee when he observed a police vehicle. (Cf. *People v. Souza* (1994) 9 Cal.4th 224, 235 ["flight from police is a proper consideration—and indeed can be a key factor—in determining whether . . . the police have sufficient cause to detain"]; *U.S. v. Dawdy* (8th Cir. 1995) 46 F.3d 1427, 1430 [reasonable detention when defendant parked in lot of closed business and attempted to leave when police car approached].) There was no evidence that defendant was casing a store. (Cf. *U.S. v. Glover* (4th Cir. 2011) 662 F.3d 694, 698-699 [reasonable suspicion when defendant appeared to be casing gas station in the middle of the night].) There was no other person present suggesting that defendant was a getaway driver. No burglary had been reported. Nor had defendant's vehicle been reported stolen. Defendant did not commit any traffic violation. There was no indication defendant had used a controlled substance.

Second, Officer Knox's testimony undermined the conclusion that defendant was casing the store. When asked if defendant was committing a crime, Knox responded, "No." When asked if defendant was "committing any crime" when detained, Knox responded, "Not that I know of." Thus, there was no "objective manifestation that [defendant] may be involved in criminal activity" at the time Knox detained him. (*Casares, supra*, 62 Cal.4th at p. 838.)

Third, although the majority correctly points out that defendant's car was idling and his lights were off, those facts do not support his detention. (*People v. Perrusquia* (2007) 150 Cal.App.4th 228.) In *Perrusquia*, a case cited by the majority, the court found the officer "lacked specific, articulable facts justifying the detention" (*Id.* at p. 230.) The officer who detained the defendant was patrolling "a high-crime area." (*Id.* at p. 231.) He entered the parking lot of a 7-Eleven store and noticed the defendant's car in the parking lot. (*Ibid.*) The defendant's car was not parked as close to the store entrance as possible and its engine was idling. (*Ibid.*) The defendant was "crouched low in the driver's seat." (*Ibid.*) When the defendant saw the officer, he exited the vehicle and tried to pass the officer. (*Ibid.*) The court first noted that facts unrelated to the defendant—such as the crime rate of the neighborhood—standing alone were insufficient to support reasonable suspicion. (*Id.* at p. 233.) The court then found the facts that the defendant's car was running and parked near an exit and the defendant tried to avoid contact with the officers were insufficient to legally detain him. (*Ibid.*)

To the same effect is *State v. Paro* (S.Ct. Vt. 2012) 192 Vt. 619, in which the Vermont high court explained: "[T]here are any number of plausible reasons why defendant may have been in the parking lot, from fixing a contact lens to making a phone call to looking at a map to dropping off her truck for service." (*Id.* at p. 622.) "[S]imply idling a car in a parking lot in the middle of the night where burglaries have previously occurred should not subject the driver to a police seizure." (*Ibid.*) In short, under our high court's decision detaining defendant was unlawful because there were no specific articulable facts suggesting defendant had been involved in criminal activity.

2. Other Authority Supports the Conclusion That the Detention Was Not Lawful

Casares applied the Fourth Amendment and is consistent with other cases applying the Fourth Amendment and involving vehicles in parking lots after the close of business in areas with prior criminal activity. For example, in *U.S. v. Slocumb* (4th Cir. 2015) 804 F.3d 677 (*Slocumb*), officers observed the defendant and his girlfriend in a parking lot of a business that had been closed in an area where officers knew drugs were bought and sold. (*Id.* at p. 679.) The court held that the following factors were insufficient to lawfully detain the defendant: “1) [a lieutenant’s] awareness of the high-crime nature of the area; 2) the lateness of the hour; 3) [the defendant’s] presence in the parking lot of a commercial business that had been closed for several hours; 4) [the defendant’s] conduct, including appearing to hurry . . . ; and 5) that [the defendant’s] conduct seemed ‘inconsistent’ with his explanation for his presence” (*Id.* at p. 682.)

Emphasizing that the defendant’s conduct was “ ‘the only substantial basis for particularized suspicion,’ ” the *Slocumb* court found insufficient evidence to support reasonable suspicion. (*Slocumb, supra*, 804 F.3d at p. 683.) The defendant did not walk away, attempt to leave, flee, or show extreme nervousness. (*Ibid.*) In other words, Officer Knox’s testimony reveals fewer grounds to support the detention than those found insufficient in *Slocumb*.

In *People v. Wilkins* (1986) 186 Cal.App.3d 804, 808, cited by the majority, the court held that a detention was unlawful. The defendant was stopped in a parking lot of a convenience market which had a history of thefts and narcotics activity. (*Ibid.*) As he drove past the defendant’s vehicle, the officer observed the two occupants of a vehicle crouch down to conceal themselves. (*Ibid.*) The court explained: there were “no objective factors in addition to the police avoidance behavior, the reputation of the area for crime, and time of night, sufficient to cause a reasonable suspicion of criminality. Therefore, the detention was illegal.” (*Id.* at p. 811.) Similarly, in this case, there was no suspicious activity prior to the detention. Moreover, there were fewer grounds to support the detention than in *Wilkins*, and defendant did nothing to conceal himself.

No basis for detention was found in a case in which two persons separately entered a defendant's car while his car was parked in a business parking lot after the close of business. (*Green v. State* (Tex.Ct.App. 1988) 744 S.W.2d 313, 314.) The court explained that if those bare facts were sufficient to support a detention "every person who meets a friend in a parking lot to exchange football tickets or engage in a brief conversation would be subject to police investigation." (*Ibid.*) Here, the majority incorrectly concludes that any person in a parking lot late at night with an engine idling is subject to investigation even when the officer acknowledges that the person was not involved in criminal activity prior to the detention.

3. Respondent's Arguments Lack Merit

First, although respondent argues that Officer Knox had reasonable suspicion to detain defendant, respondent cites no authority to support that argument. As previously explained, the argument is contrary to *Casares*.

Second, respondent argues that even if the detention were unlawful, the exclusionary rule does not apply because defendant committed a new crime after the detention. In *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1261, the court explained that the exclusionary rule does not exclude evidence of crimes of violence committed on a peace officer even if those crimes were preceded by a Fourth Amendment violation.

The principle articulated in *In re Richard G.* does not apply here because defendant committed no new crime. As the majority recognizes, convictions for resisting arrest required evidence that the officer was lawfully performing his duties. (Maj. opn. *ante*, at p. 8.) Because I conclude that Officer Knox was not lawfully performing his duties when he detained defendant, I would reverse the denial of defendant's suppression motion and the denial of his motion for acquittal.

FLIER, J.